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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 71-66

MARVIN GUON, Petitioner

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE
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Marvin Guon, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on May 19, 1971; a timely Petition for Rehearing en banc was denied on June 15, 1971.

JUDGMENTS AND OPINIONS BELOW

The judgment of the District Court below (Appendix B) has not been officially reported.

The judgment and opinion of the Court of Appeals (Appendix C and D) has not been officially reported as yet.

JURISDICTION

This is a criminal prosecution charging petitioner,

as defendant, with offenses under a two count Indictment with alleged false statements in a home loan application. Specifically, petitioner was alleged to have omitted a tax "lien" (R 1)[1] in the sum of $2,037.68, and an outstanding judgment in the sum of $7,044.88. The full text of the Indictment will be found in Appendix A for the Court's convenience. Defendant was convicted on both counts. On Count I., he was sentenced to 90 days imprisonment, on Count II., imposition of sentence was suspended and he was placed on probation for 3 years to be served consecutively (R 7 & 8).

The jurisdiction of the District Court was invoked under 18 U.S.C. Sec. 1010, and 3231. The Court of Appeals affirmed the judgment in an opinion rendered May 19, 1971, a timely Petition for Rehearing was denied on June 15, 1971, (Appendix E). The jurisdiction of the Circuit Court was invoked under 28 U.S.C. Sec. 1291, and 1294. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

Irrespective of Rule 23.1 (c) of this Court, petitioner is taking the liberty of suggesting whatever subsidiary questions may be involved.

1. Is it by definition, "plain error affecting substantial rights", for the District Court to entirely omit the material elements of the offense in its instructions to the jury?

2. Is the portion of 18 U.S.C. Sec. 1010 dealing with the

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1 The reference "R" refers to the record on appeal, while the record has not been transmitted, it is so small that this Court may choose to request it pending this Petition.

Department of Housing and Urban Development not only material, but the critical element, in fact, the basis of federal jurisdiction?

3. Does the omission of any reference whatsoever to the Department have the affect of creating an entirely different offense than that intended by Congress?

4. Is not at the very least, "intent to influence the Department in any manner", the essence of the offense?

5. Did not Congress intend, that intent to deceive with the basic elements of fraud, be incorporated into the offense?

6. If Congress did not intend deception to be incorporated into the offense, but actually sought to make it an offense to influence in any manner, is not 18 U.S.C. Sec. 1010 unconstitutional as being too vague, dispensing with mens rea for a felony, and as violating due process of law, and equal protection of the laws when compared with 18 U.S.C. Sec. 1001?

7. Is it a violation of due process to be charged and convicted for wilfully and knowingly failing to list a tax lien, when there was no tax lien as both the Government's evidence indicated and the Court of Appeals held?

8. Should not the Courts, and is this not the proper case where appellate Courts should begin to review the sentences imposed, as the single most effective way to reduce the number of appeals?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The relevant portions of the United States Constitution are:

A. Amendment V., which states in relevant part:

"---nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;---"

B. Amendment XIV., which states in relevant part:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II. The relevant statute involved is:

A. 18 U.S.C. Sec. 1010, which states:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than $5,000 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 751."

STATEMENT

The following is all that is necessary for this Court

to consider the issues involved. On November 15, 1967, petitioner went to the Lloyd Center Branch of the United States National Bank, in Portland, Oregon, and applied for a home improvement loan (Tr. 6).[2] The bank officer and petitioner had done business for quite sometime and apparently this relationship was quite informal (Tr. 9, 36, 44). Much of the application was filled out by the bank officer as a result of information obtained over the phone. Petitioner signed a form that did not list the tax lien or the judgment (Tr. 7, 10). With respect to the judgment, petitioner retorted that he believed the bank officer knew that it arose as a result of an accommodation for his relative, and that it was essentially unenforceable (Tr. 39-40, 45). Guon did not know he had a tax lien. Significantly, the lien was not filed until after November 15, 1967, and the agents testified that it is more than likely that petitioner did not know of the lien because the debtor is not notified of the lien. Petitioner was aware that he owed around $1,500.00, but was awaiting a final determination of the amount (Tr. 46). The tax lien was for over $2,000.00.

The chief problems arose over the Court's instructions. The Court essentially said that if petitioner wilfully and knowingly failed to list the tax lien, and/or the judgment, this constitutes the offense (Tr. 47-51). The Court omitted any reference whatsoever to the Department of Housing and Urban Development's role. Not only did the Court fail to instruct

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2 The reference "Tr." refers to the Transcript in case this Court desires to examine it.

that petitioner's intent, or purpose must be to influence in any manner the Department, but the Court did not mention the Department at all.

Petitioner has to reluctantly concede that no objection whatsoever was raised during the trial, no exceptions were taken, and the two requested instructions were given.

REASONS FOR GRANTING THE WRIT

1. Intent to Influence the Department of Housing and Urban Development is the material element of the offense.

Petitioner respectfully submits this is a case of first impression. This Court has never really examined, construed, nor considered the validity of 18 U.S.C. Sec. 1010. Petitioner should add, in all candor, that the issue has not been tendered to this Court too frequently until recently.

However, petitioner respectfully submits the issues presented herein not only represent a novel Federal question, but are of substantial urgency and can only be resolved by this Court. The number of prosecutions under 18 U.S.C. Sec. 1010 are substantial, and are roughly comparable to 18 U.S.C. Sec. 1001 which covers a broader range of activity. When one considers the expanding housing market, the number of prosecutions under this 18 U.S.C. Sec. 1010 is bound to become voluminous. Petitioner submits there is scarcely a home owner that has not applied for a home improvement loan, which is essentially synonymous with an F.H.A. loan. Yet, every potential applicant may, inexplicably find himself subjected to the very broad reaches of the statute.

Petitioner, further submits that 18 U.S.C. Sec. 1010 has caused considerable consternation among the Circuits. The principle reason convictions have been appealed have been over a problem of construction. However, no Court, as far as petitioner can discern, has construed the statute as the Courts below have done. In fact, the construction by the District Court, and tacitly by the Circuit Court, conflicts with the vast majority of the Circuits.

The District Court entirely omitted the crucial element, concerning the Department of Housing and Urban Development, of the offense from its instructions, creating an entirely new crime. The Circuit Courts have said time and again the equation required under the act is falsity and knowledge, plus intent to use such falsehood to influence the Department of Housing and Urban Development, e.g. CIT Corporation vs. United States 150 F2d 85, 93 (9th Cir. 1945), Bins vs. United States 331 F2d 390, 392 (5th Cir. 1964), Brilliant vs. United States 297 F2d 385, 389 (8th Cir. 1962), Smith vs. United States 230 F2d 935 (6th Cir. 1956).

The District Court, by omitting any reference to the Department of Housing and Urban Development, made it a crime merely to knowingly tender a false statement to a bank. That is not the offense, however. Congress' stated objective in enacting 18 U.S.C. Sec. 1010, indeed the plain language of the statute, clearly shows that Congress was trying to prevent frauds on the Department. Indeed, the basis of Federal jurisdiction is the Department's role in insuring the loan. That is why almost without exception, the Courts state that the accused must also have the specific intent to at least influence the Department.

The Circuit Court stated that defendant's attack on the instructions was foreclosed by Rule 30 (Appendix D). While Rule 30 serves a laudable purpose, and Rule 52 b must not be abused if 52 b is not invoked for a failure to instruct on a material element of the offense, petitioner cannot imagine when it should ever be invoked.

Petitioner submits that the failure to instruct on a material element of the offense is by definition "plain error affecting substantial rights". This Court has said several times that the prosecution's historic fundamental duty is to prove each element of the offense beyond a reasonable doubt. The common law system indulges in various presumptions, albeit fallacious perhaps, on a general verdict. However, the only way these can be indulged in, is by the assumption that unless the legal issues, and elements, are defined by the Court, the jury was in total ignorance of them in arriving at their verdict. That is why the District Court at least must define the material elements of the offense, whether requested or not. To hold otherwise could have profound ramifications. Logically, it would follow that an accused must specifically request an instruction on reasonable doubt and except to its omission before he may complain on appeal. Petitioner finds it hard to believe that this Court, or any Court, would not find the total omission of an instruction on reasonable doubt plain error. Yet, would that not logically follow the Circuit Court's resolution of the issue in this case? Petitioner respectfully submits that the only way Rule 30 could be made an issue would be to construe the entire clauses of 18 U.S.C. Sec. 1010 concerning the Department of Housing and Urban Development, as mere insignificant verbiage. The plain language of the statute precludes this.

2. Intent to Deceive must be incorporated into the statute in order to effectuate Congress' intent and to save 18 U.S.C. Sec. 1010 from constitutional difficulties.

The issue submitted herein is something only this Court can resolve. Petitioner submits that the various Courts have exhibited considerable difficulty over primarily 18 U.S.C. Sec. 1010 and to some extent 18 U.S.C. Sec. 1001. The Court's comments in Friedman vs. United States 374 F2d 363, 1 ALR Fed. 348 (8th Cir. 1967) state the problems far better than petitioner can. The difficulty with 18 U.S.C. Sec. 1010 is that it makes it an offense to tender a falsehood with the intent to influence the Department "in any manner". This is fairly broad language. This is why many Courts, e.g. Brilliant vs. United States, supra, have added more; the defendant must have a negative objective in mind with respect to the Department.

The Courts seem to recognize that fraud is involved, but none have expressly incorporated the elements of deception into the statute. This is something only this Court can do and it is submitted it must be done if Congress' intent is to be recognized and all of the appeals involving the construction of the act are to be ended. Indeed, unless the elements of fraud are incorporated into the statute, severe constitutional infirmities abound.

Suffice to say at this point, the Congressional history of the statute clearly shows that Congress had one objective in enacting 18 U.S.C. Sec. 1010, that is to prevent frauds on the F.H.A. Although this statute has a long and varied history, it is generally believed that the last thorough examination occurred in 1934 with the passage of the False Claims

Act and National Housing Act. Of course, this Court has not aided in the endeavor. One inkling of Congress' thoughts are tellingly set forth in House Report No. 829, 73rd Congress, 2nd Session accompanying H.R. 8046. The statute has usually been considered in conjunction with the parent of 18 U.S.C. Sec. 1001. However, until 1948 it had been attached to the National Housing Act. Finally in 1948 Congress placed it in the "Fraud and False Statements" section following 18 U.S.C. Sec. 1001; petitioner suggests this was no accident. Yet despite recognizing that fraud is involved, the Court's have not incorporated the elements of deceit into the offense. It is submitted this is not consistant with Congress' stated objective. It is respectfully submitted that this Court should once and for all end the confusion and add the elements of fraud, including the requirement that the false statement be a past or present material fact with the intent that the Department will reasonably rely on the statement to its detriment.

3. Validity of 18 U.S.C. Sec. 1010.

It is submitted that unless fraud is incorporated into the statute it must be declared invalid. Unless the statute is examined thoroughly, many Courts assume that a violation of the act is a fraud on the Government. Judge Duniway in questioning from the bench during argument of this appeal, made that very observation; the Trial Court made that conclusion during sentencing, and indeed, petitioner almost made the same mistake.

However, according to a literal reading of the statute, far less is sufficient. All that is necessary is that the accused intend to influence the Department in any manner. If that

is taken literally 18 U.S.C. Sec. 1010 is void for several reasons. For instance it is too vague in defining what conduct may result in criminal sanctions, Cf. United States vs. Lamb 385 U.S. 475. That is why Brilliant, supra, for instance, added intent to influence the Department into favorable action, but that is not literally what the statute says.

To influence in any manner violates due process by dispensing with mens rea for a felony. To influence in any manner is rather neutral. Petitioner realizes this Court prefers to decide cases on the narrowest possible grounds. However this case could provide a vehicle for this Court to discuss whether mens rea can be dispensed for a felony. It is apparent that this Court has been looking for such an occasion, e.g. Morissette vs. United States 342 U.S. 246 (1952).

Finally when compared with 18 U.S.C. Sec. 1001 the statute violates the equal protection and due process concepts of the 5th and 14th Amendments. For most situations fraud is required; however, for the Department of Housing and Urban Development all that is required is influencing into favorable action. Less is required for an applicant for a home improvement loan to be subjected to criminal processes than most other situations. This, it is submitted, is not only unreasonable and arbitrary, but whatever reasonable objective this distinction is supposed to serve is difficult to discern.

4. Failure of Proof.

Petitioner concedes that it is difficult to frame a substantial Federal question as a result of the difficulties that arose over the fact that he was charged and convicted for wilfully and knowingly failing to list a tax lien when there

was no tax lien. However, petitioner is tendering this issue with the possibility that this Court could discern a substantial question with national ramifications.

The fact of the matter is that defendant was charged with wilfully and knowingly failing to list a tax lien. This was done because the form, drafted pursuant to regulations, requires the applicant to list his fixed obligations. The Government's proof indicated that defendant did not know, nor could have known of a tax lien because the lien was filed after the execution of the application. In fact, absent a demand, there was no lien as the Court below stated. However, consistent with the Trial Court's instructions, the jury convicted defendant for wilfully and knowingly failing to list his tax lien. Whether this can lead to problems within the meaning of Russell vs. United States 389 U.S. 749, (1963) is not a foregone conclusion. In addition, whether there are due process ramifications is not tenuous to say the least.

5. Propriety of Appellate Courts in reviewing sentences.

Petitioner does not contend that the Eighth Amendment is involved. He is just submitting this issue to this Court in its supervisory role in an effort to reduce the number of appeals.

Petitioner submits that the principle reason a case is appealed is because of the sentence that is imposed. The longer the sentence is, the greater the likelihood of an appeal. The conjestion caused by criminal cases on the appellate dockets is well known. The Chief Justice has frequently made that observation.

Thus, it is submitted that appellate Courts should give more than cursory review to the sentences imposed. The incidents of such review are very rare in Anglo-American jurisprudence. There are no constitutional ramifications in this, just the expeditious administration of justice. Petitioner suggests this is the type of case where such a practice should be instituted.

Petitioner will be imprisoned for 90 days, but could be in constructive custody for a minimum of three years. Conceivably he could be in custody for five years and three months, should his probation be revoked. If financial stability is a condition of probation, the outcome of petitioner's probationary status is not a foregone conclusion. Had there been a policy of merely probation for a first conviction, which this is, it is more than likely that no appeal would have been taken nor this petition filed. Few attorneys could justify the expense of an appeal to his client. So the consequence of a potential 90 days confinement resulted in the 9th Circuit and this Court's docket being further congested with yet another case.

The practicality of the situation requires a different approach to the sentencing practices of this country. It is respectfully submitted this is precisely the type of case where this Court may choose to alter the practices utilized. A mere indication that this Court was reviewing the sentence rendered could go a long way towards accomplishing the objective.

CONCLUSION

The first six questions presented in this petition raise fundamental questions of first impression. Sooner or later this Court has to resolve the various serious questions

that have arisen over 18 U.S.C. Sec. 1010. The urgency demanded for their resolution cannot be over emphasized. While this case is critical to petitioner, who faces a potential 5 years and 3 months loss of freedom, it is also important to the nation as a whole.

For all these reasons it is respectfully submitted that a petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I. That on or about November 15, 1967, at Portland, Oregon, in the District of Oregon, MARVIN GUON, defendant herein, for the purpose of obtaining a loan from the United States National Bank, Portland, Oregon, a corporation, for improvements on the property located at 10438 S.W. Hood Avenue, Portland, Oregon, and with intent that such loan would be offered to and accepted by the Department of Housing and Urban Development for insurance and for the purpose of influencing the action of the Department of Housing and Urban Development to accept such loan for insurance, did knowingly, wilfully make, pass, utter and publish and cause to be made, passed, uttered and published upon the said United States National Bank Portland, Oregon, a certain false statement in a document to-wit:

> a Federal Housing Administration Credit Application for Property Improvement Loan, dated November 15, 1967, and signed by Marvin and Kay F. Guon as applicants, which application omitted to list, as required, an Internal Revenue Service tax lien in the sum of $2,037.68 entered against said Marvin Guon on or about August 23, 1967,

when the said MARVIN GUON well knew at the time said statement was made, passed, uttered, and published that said statement was false in that the above-described Internal Revenue Service tax lien had been entered against him; all in violation of Section 1010, Title 18, United States Code.

COUNT II. That on or about November 15, 1967, at Portland, Oregon, in the District of Oregon, MARVIN GUON,

Appendix A, cont.

defendant herein, for the purpose of obtaining a loan from the United States National Bank of Oregon, a corporation, for improvements on the premises located at 10438 S.W. Hood Avenue, Portland, Oregon, and with intent that such loan would be offered to and accepted by the Department of Housing and Urban Development for insurance and for the purpose of influencing the action of the Department of Housing and Urban Development to accept such loan for insurance, did knowingly, wilfully make, pass, utter and publish and cause to be made, passed, uttered and published upon the said United States National Bank of Oregon, a certain false statement in a document, to-wit:

> a Federal Housing Administration Credit Application for Property Improvement Loan, dated November 15, 1967, and signed by Marvin and Kay F. Guon as applicants, which application omitted to list, as required, a judgment in the sum of $7,044.88 entered against said Marvin Guon on or about April 12, 1966,

when the said MARVIN GUON well knew at the time said statement was made, passed, uttered, and published that said statement was false in that the above-described judgment had been entered against him; all in violation of Section 1010, Title 18, United States Code.

Dated this 24th day of March, 1970.

A TRUE BILL

/s/ Jim A. Mc Neff
FOREMAN

APPENDIX B

JUDGMENT OF THE DISTRICT COURT

On this 9th day of September, 1970 came Joseph Buley the attorney for the government and the defendant appeared in person and by retained counsel, David Weinstein.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of knowingly, wilfully making, passing, uttering and publishing and caused to be made, passed, uttered and published a false statement for the purpose of obtaining a loan from the United States National Bank, Portland, Oregon, for the purpose of influencing the Department of Housing and Urban Development to accept a loan for insurance as charged in Counts I and II of the indictment, in violation of Section 1010, Title 18, United States Code and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ninety days (90) on Count I.

Imposition of sentence on Count II of the indictment is suspended and the defendant placed on probation for a period of three years (3). Such period of probation to be consecutive to the term of imprisonment imposed on Count I, upon the

Appendix B, con't.

further conditions of probation as contained in Probation Form No. 7, and upon the further condition defendant make an honest effort to pay the balance of the loan.

It is ordered that execution of sentence of imprisonment be stayed to Monday, September 14, 1970, at 10:00 A.M., at which time defendant shall surrender himself to the custody of the United States Marshall for commitment in accordance with the sentence imposed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshall or other qualified officer and that the copy serve as the commitment of the defendant.

_____

United States District Judge

APPENDIX C

OPINION

PER CURIAM:

Guon was convicted under both counts of an indictment charging violation of 18 U.S.C. Sec. 1010.

The only point raised that merits consideration arises under Count I. That count charges that Guon, in an application for a bank loan to be insured by the Department of Housing and Urban Development, failed to list, as required, "an Internal Revenue Service tax lien in the sum of $2,037.68, entered against . . . Guon on or about August 23, 1967." The application form required answers to two pertinent questions: (1) "Do you have any past-due obligations owed to . . . any agency of the Federal government?" and (2) "Debts: list all fixed obligations . . ." Guon answered the first question "No" and did not list a Federal tax obligation in response to the second.

The evidence is that on August 23, 1967, Guon and his accountant filed income tax returns of Guon for the years 1962, 1963, 1964 and 1966, disclosing liabilities of over $2,000 which were unpaid when Guon signed the loan application on November 15, 1967. There is no question that Guon knew that he owed the money. His claim is that there was no tax lien, and in this he is correct. The record discloses no demand (26 U.S.C. Sec. 6321) and no filing of a lien before November 15, 1967.

The variance, however, is harmless. Rule 52 (a), F.R.Crim.P. The indictment did describe a past due obligation to an agency of the Federal Government; it did describe a fixed liability. Use of the word "lien" was unnecessary; Guon knew what was involved; at trial he never mentioned the variance of

Appendix C, con't.

which he now complains. He admitted that he knew that he owed the taxes, but claimed that he did not know the precise amount.

Guon's attack on the court's instructions is foreclosed by Rule 30, F.R.Crim.P.

No other point merits discussion.

Affirmed.

APPENDIX D

JUDGMENT

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Cour in this Cause be, and hereby is affirmed.

Filed and entered May 19, 1971.

APPENDIX E

DENIAL OF REHEARING

The panel as constituted in the above case has voted to deny the petition for rehearing, Judges Chambers and Duniway voted to reject the suggestion of a rehearing in banc, Judge Madden not voting on that question.

The full court has been advised of the suggestion of an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

FILED
June 15, 1971
Wm. B. Luck, Clerk

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OCTOBER TERM, 1971

MARVIN GUON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-66

MARVIN GUON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial, petitioner was convicted in the United States District Court for the District of Oregon, on both counts of a two-count indictment which charged the making of false statements in connection with a Federal Housing Authority loan application (18 U.S.C. 1010). On September 9, 1970, he was sentenced to ninety days' imprisonment as to Count I; as to Count II, imposition of sentence was suspended and petitioner was placed on probation for three years. The court of appeals affirmed the conviction.

441-249—71

The undisputed evidence (Pet. 5) showed that on November 15, 1967, in an application for a federally insured bank loan to be used for a housing improvement, petitioner failed to disclose that he owed approximately $2,000 to the United States for past due income taxes (Count I) and that he owed a judgment creditor approximately $7,000 (Count II).

1. The indictment charged that petitioner made the false statements in a Federal Housing Administration Credit Application for the purpose of obtaining a loan from a Portland bank "with intent that such loan would be offered to and accepted by the Department of Housing and Urban Development for insurance." At trial, the court in its instructions failed to identify the federal agency to whom petitioner's loan application would be submitted. There was no objection to the charge (see Pet. 8); nor was there any dispute about the fact that the application for an F.H.A. loan was presented to the Department of Housing and Urban Development as charged in the indictment. Indeed, petitioner writes: "* * * there is scarcely a home owner that has not applied for a home improvement loan, which is essentially synonymous with an F.H.A. loan" (Pet. 6). Consequently, any failure in the instructions to identify the defrauded federal agency was harmless. See *United States* v. *Jackson,* 436 F. 2d 39 (C.A. 9); *Brown* v. *United States,* 334 F. 2d 488, 491–492, 497–501 (C.A. 9), affirmed on other grounds, 381 U.S. 437; *Guy* v. *United States,* 336 F. 2d 595 (C.A. 4).

2. Petitioner's contention that the statute involved is so broad that it could be used to punish a defendant

with a benign purpose (Pet. 9–11) has no application to petitioner. The jury was told that petitioner could be convicted only if he deliberately understated his liabilities and not if misstatements were unknowing or negligent (see Pet. 5). Thus, the jury found that his purpose was to mislead, to its detriment, the government agency to whom his loan application was forwarded.

3. The fact that the indictment described the income tax indebtedness as a tax lien (Count I) whereas the tax lien was not formally filed until after petitioner had submitted his credit application (Pet. 12) is, as the court below held, an immaterial variance. It did not matter when the lien was filed because the application required disclosure of any past due obligation, whether reduced to a lien or not. As early as August 1967, three months before submission of his loan application, petitioner had acknowledged his income tax liability of over $2,000 (Pet. App. C. 19).

4. As to the suggested appellate review of sentences (Pet. 12–13), petitioner's argument has no bearing in this case where, on felony convictions, petitioner was sentenced to ninety days' imprisonment and three years' probation. In view of the light sentences imposed there is clearly no occasion here to reconsider the Court's ruling in *Blockburger* v. *United States*, 284 U.S. 299, that the extent of punishment, even if severe, is to be determined by the trial court "with whose judgment there is no warrant for interference on our part" (248 U.S. at 305); *United States* v. *Rosenberg*, 195 F. 2d 583, 604 (C.A. 2), certiorari denied,

344 U.S. 838; see *Gore* v. *United States*, 357 U.S. 386, 393.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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